

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Section 309(j))
of the Communications Act)
Competitive Bidding)

PP Docket No. 93-253

TO: The Commission)

COMMENTS

OF

NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.

Respectfully submitted,

National Association of Business
and Educational Radio, Inc.

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SUMMARY

The National Association of Business and Educational Radio, Inc. ("NABER") respectfully submits the following Comments in response to the above captioned Notice of Proposed Rule Making.

At NABER's recent mid-year membership meeting, the initial consensus of the various membership sections of NABER, on the whole, endorsed the use of oral bidding as a basic auction method and recommended its use where the Commission determines that auctions promote the objectives of Section 309(j)(2). Accordingly, NABER is in agreement with the tentative conclusion of the Commission that it adopt an oral bidding method for its auction procedure.

With respect to adoption and implementation of competitive bidding, NABER wishes to caution the Commission not to create mutually exclusive areas of licensing which do not presently exist. Specifically, at 800 MHz, where there is a licensing on a first come, first serve basis, licenses are being processed to the extent they are available or to the extent an engineering showing can be made under current rules without the need to create a mutually exclusive situation. Should the Commission, for example, stop processing licenses or otherwise declare a freeze in licensing, it would create an artificial mutually exclusive contest for such licenses. This is particularly important given the need to recognize that at 800 MHz, Specialized Mobile Radio systems need to continually add and expand their already existing systems and business must be conducted as usual without disruption.

For 220 MHz land mobile systems, it is not clear whether or not there would be a mutually exclusive result in the market place. NABER therefore believes that once the Commission determines that it is prepared to release additional 220 MHz licenses, that it first accept applications on a local basis to enable a first come, first serve processing to function. To the extent there are competing mutually exclusive applications in a market, it thereafter would move to auction. In this manner, existing licensees who need to expand their system coverage or new applicants can chose their transmitter location and market and mutually exclusive applications may not result. With respect to implementation of auctions, it is believed that the process is better served on newly issued blocks of spectrum or reallocated blocks such as the 900 MHz Specialized Mobile Radio licenses Phase I in areas where there are more applicants than licenses and in perhaps Phase II if the licenses are to be granted in blocks of frequencies.

NABER supports the Commission's finding that since private carrier paging frequencies are currently shared the competitive bidding process should not be applied to those licenses. NABER further agrees that the adoption of the "earned exclusivity concept" by existing licensees on the 900 MHz paging channels recently adopted by the Commission does not transform such a channel into a mutually exclusive situation requiring auctioning. The 900 MHz PCP channels having been subject to shared use by licensees who have already been assigned a license on such frequencies.

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COMMENTS
OF
NATIONAL ASSOCIATION OF BUSINESS
AND EDUCATIONAL RADIO, INC.

The National Association of Business and Educational Radio, Inc. ("NABER") by its attorneys respectfully submits, pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. Section 1.415, the following Comments in response to the above captioned Notice of Proposed Rule Making.

I. Background

NABER is a national, non-profit, trade association headquartered in Alexandria, Virginia, that represents the interests of large and small businesses that use and provide land mobile radio communications in the operation of their businesses and that hold thousands of license in the private land mobile radio services. NABER has six (6) membership sections representing users, Private Carrier Paging licensees, radio system integrators, technicians, Specialized Mobile Radio operators and tower site owners and managers. NABER's membership comprises over 6,000 businesses and private carriers holding thousand of licenses in the Private Land Mobile Services.

Pursuant to the amendments to the Communications Act adopted in the Omnibus Budget Reconciliation Act of 1993 ("Budget Act") which added new Section 309(j) to the Communications Act of 1934, the Commission was given the express authority to employ competitive bidding procedures to choose from among two (2) or more mutually exclusive accepted applications for initial licenses.

The Commission in its Notice of Proposed Rule Making has proposed that auctions be limited to (a) mutually exclusive applications, (b) initial license applications (and not renewal or modification applications), and (c) radio communications services that principally use their spectrum to provide service to subscribers for compensation. Accordingly, based upon such criteria, the Commission has proposed to exclude most mass media services and services used by public safety entities from such competitive bidding.

The Commission has tentatively concluded as follows:

- Competitive bidding should begin immediately for Personal Communication Services ("PCS"), as well as some services regulated by the Private Radio and Common Carrier Bureaus such as Specialized Mobile Radio, Interactive Video Data Service and certain Cellular Radio Service applications.

- The Commission has proposed a variety of ways to meet Congress' requirement that small businesses, rural telephone companies and businesses owned by women and minorities be given an opportunity to participate in the competitive bidding process. Specifically, the Commission has proposed to set aside spectrum for

those designated groups including a proposal to set aside a 20 MHz frequency block and a 10 MHz block in the context of broad band PCS to be licensed on a Basic Trading Area (BTA) basis. Such designated groups would be able to pay for their licenses over time and the Commission has asked if tax certificates should be used to assist the designated groups as well.

- The NPRM also seeks comments on alternative approaches for bidding, payment, deposits, safeguards and bidder qualifications and eligibility. The Commission has tentatively concluded that although there are a significant number of bidding options which it could employ, that oral bidding should be the basic bidding method. The Commission also proposed in certain context to permit the concept of bidding for a group of licenses also known as Combinational Bidding and had reached a tentative conclusion for implementing group bidding for broad band PCS licenses.

- The NPRM proposes that licenses should be offered sequentially and that for PCS services the largest markets be auctioned first. Except for designated group bidders, auction winners would be required to pay in a lump sum upon license grant.

- The Commission also proposed to prevent certain unjust enrichment of parties obtaining licenses via auction as well as licenses granted by lottery.

II. Overview of the Auction Law

It needs to be made clear that notwithstanding Congress' implementation of auction authority, there was a clear directive under Section 309(j)(2)(b) of the Act that the Commission first determine that use of such a system of competitive bidding will promote the objectives as set forth under Section 309(j)(3) of the Act. The objectives to be obtained were set forth in Paragraph 12 of the Notice as follows:

- That there be a development and rapid deployment of new technologies, product and services for the benefit of the public.
- To promote economic opportunity and competition and ensure new and innovative technologies to be readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants including small businesses, rural telephone companies and businesses owned by members of minority groups and women.
- Recovery for the public of a portion of the value of the public spectrum made available for commercial use and avoidance of unjust enrichment through the methods employed to award such uses of that resources.
- Promote efficient and intensive use of the electromagnetic spectrum.

Accordingly, the auction legislation is a mechanism for issuing licenses and not for allocating spectrum. It can be stated that competitive bidding therefore is not required in every case

and, in fact, the public interest obligations of the Commission remain and override the issuance of licenses through auctions.

Before a license can be auctioned, there must be a determination of its "auctionability" to determine when a service or class of service should be subject to competitive bidding. Specifically, the Commission recognizes that in many services regulated by the Private Radio Bureau mutual exclusivity cannot exist because the channels are shared by licensees. Accordingly, no license would be denied on the basis of mutual exclusivity. Similarly, there may be instances where mutual exclusivity does not exist because applications can be filed to avoid such impact based on engineering solutions or filings on a first come, first serve basis.

The NABER membership is constituted of both large and small users, carriers and vendors of product directly impacted by the adoption of competitive bidding in the license determination stage. Various members of NABER will file their own comments as to the auction design process and the various areas raised with respect to bidding, alternative payment plans, treatment of designated entities, safeguards and application bidding and licensing requirements./¹

¹ In this respect, given the complexity of this proceeding there will be a divergence of views by various members of NABER as to the appropriate bidding process and auction procedures to be adopted by the Commission.

III. Oral Bidding

At NABER's recent mid-year membership meeting, the initial consensus of the various membership sections of NABER, on the whole, endorsed the use of oral bidding as a basic auction method and recommended its use where the Commission determines that auctions promote the objectives of Section 309(j)(2). Accordingly, NABER is in agreement with the tentative conclusion of the Commission that it adopt an oral bidding method for its auction procedure./²

In reaching this conclusion, NABER agrees that the general benefits of oral auctions should result in the award of licenses to those parties that value them the most in a manner in which the public will gain confidence in the overall auction process. Although one disadvantage to oral bidding is that such process may be subject to manipulation or collusion (which would reduce not only the amount of revenue to be raised by the value of the license at auction, but also the public confidence with respect to the process), NABER agrees with the Commission that it should be in a substantial position to prevent collusive bidding. In doing so, however, the Commission must recognize there may, in fact, be a need for the gathering of information about what other bidders may value spectrum in order to participate in the process in a

² NABER recognizes the complex nature of the adoption and implementation of the auction process by the Commission. Accordingly, as the record develops in greater detail in this proceeding, NABER anticipates a continued review by its section members which may modify or further formulate the association's position on the issues raised in this proceeding.

reasonable business fashion. Further, that to the extent group bidding or combinational bidding by bidders or by small businesses is allowed such rules must be crafted to allow for such permitted activities./³

IV. Specific Services

The Commission has proposed to focus on certain classes and permits which should be included within or excluded from competitive bidding. It proposes to divide the licenses issued by the Commission into two (2) broad groups. The first group such as PCS licenses consist of licenses or classes or permits for which it is imperative to decide quickly whether or how those licenses should be subjected to competitive bidding. The second group consists of licenses and permits for which a decision on competitive bidding, although important, is not required to be made as quickly as the first class.

The Commission has included Personal Communication Services in its first class as well as certain Private Land Mobile Services. In particular, the Commission has addressed the 220 MHz land mobile systems, 800 and 900 MHz Specialized Mobile Radio systems as well as the 800 MHz General Category channels and 800/900 MHz intercategory sharing channels.

With respect to adoption and implementation of competitive bidding, NABER wishes to caution the Commission not to create mutually exclusive areas of licensing which do not presently exist.

³ The gathering of information on value is, of course, different from the actions of bidders to actually impact or skew the bid process.

Specifically, at 800 MHz, where there is a licensing on a first come, first serve basis, licenses are being processed to the extent they are available or to the extent an engineering showing can be made under current rules without the need to create a mutually exclusive situation. Should the Commission, for example, stop processing licenses or otherwise declare a freeze in licensing, it would create an artificial mutually exclusive contest for such licenses. This is particularly important given the need to recognize that at 800 MHz, Specialized Mobile Radio systems need to continually add and expand their already existing systems and business must be conducted as usual without disruption.

To the extent licenses are received on a first come, first serve basis they therefore do not constitute licenses which are deemed to be mutually exclusive and therefore are not subject, in NABER's opinion, to the competitive bidding process. To the extent the Commission revisits its wide-area proposal/⁴ and releases newly made available spectrum under a different mechanism and thereby creates the existence of blocks of spectrum being issued in a mutually exclusive fashion, such a competitive process may, in fact, be applied to any applications filed after the implementation date. However, on the whole for 800 MHz SMR licenses, the Commission should continue to process any applications received by it on a first come, first serve basis and to treat two applications as not mutually exclusive just because they were received on the same day at the Commission for the same frequency.

⁴

For 220 MHz land mobile systems, it is not clear whether or not there would be a mutually exclusive result in the market place. NABER therefore believes that once the Commission determines that it is prepared to release additional 220 MHz licenses, that it first accept applications on a local basis to enable a first come, first serve processing to function. To the extent there are competing mutually exclusive applications in a market, it thereafter would move to auction. In this manner, existing licensees who need to expand their system coverage or new applicants can chose their transmitter location and market and mutually exclusive applications may not result. The point being once again that the Commission itself should not create artificially mutually exclusive situations where its normal licensing processes on a first come, first serve basis satisfies a licensing format which does not require auctioning. Further, the size of the systems and number of licenses should not be slowed by the auction process. With respect to implementation of auctions, it is believed that the process is better served on newly issued blocks of spectrum or reallocated blocks such as the 900 MHz Specialized Mobile Radio licenses Phase I in areas where there are more applicants than licenses and in perhaps Phase II if the licenses are to be granted in blocks of frequencies.

The Commission has indicated that it will not apply the auction process except for the initial grant of a license and will not do so for modifications and renewals. It should be made clear that modifications will allow an existing analog SMR licensee to convert from analog technology to digital use without the need to be subject to an auction. In addition, a request to modify a license and use an extended implementation construction schedule should be classified only as a license modification and not as an initial license for a new frequency. Such types of modifications would also take place to the extent an existing SMR operator wishes to add other channels to the extent available to its system in a market or wishes to relocate or move its transmitter or reconfigure the technology utilized on its system operation.

The Commission has also determined that competitive bidding does not apply on the shared frequencies. In this respect, NABER supports the Commission's finding that since private carrier paging frequencies are currently shared and are not being made available on a mutually exclusive basis, that the competitive bidding process should not be applied to those licenses. NABER further agrees that the adoption of the "earned exclusivity concept" by existing licensees on the 900 MHz paging channels recently adopted by the Commission does not transform such a channel into a mutually exclusive situation requiring auctioning. The 900 MHz PCP channels having been subject to shared use by licensees who have already been assigned a license on such frequencies. Further, the 150

MHz and 450 MHz paging frequencies are actually Business Category frequencies and are available to non-commercial systems. In the 900 MHz band, PCP frequencies are also available to non-commercial entities through intercategory sharing.

**V. The Commission Needs to Take into Consideration
the Interests of Small Businesses**

As is clear from the legislation as well as from the NPRM, the Commission has recognized the importance that its processes not interfere or unduly disadvantage the ability of small businesses to participate in the competitive bidding process. The Commission has proposed that small businesses which for a designated group be given the ability to bid and pay over time or installments as opposed to lump sum payments. The Commission needs to recognize the particular needs of small businesses which need to be served in an attempt to compete in the auction process. Small businesses either must be given an ability to qualify and to bid on spectrum or otherwise join together in certain coalitions in a manner so as to be able to compete with other larger bidding participants. The NABER membership historically has been made up of both large and small carriers and to the extent the small communication providers have viewed the auction process with trepidation and uncertainty, it is paramount that the Commission take into account all levels of their concern and implement specific methodologies which will

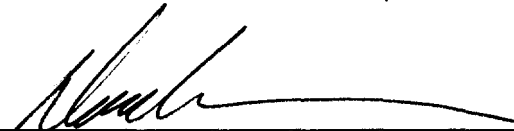
enable them to compete. One example of such an aid may be to allow the use of security interests in license to be held by lenders, thereby encouraging commercial lenders to make capital available to an auction winner.

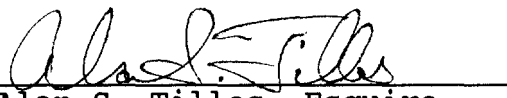
VI. Conclusion

WHEREFORE, the National Association of Business and Educational Radio, Inc. hereby respectfully requests that the Commission consider the above-said comments and act in a manner in accordance with the views expressed herein.

Respectfully submitted,

National Association of Business
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